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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1036

JEAN D. LARSON, Individually and as the Acting Commissioner of Labor of the virgin Islands of the United States,

Appellant,

vs.

ALFRED ROGERS and RUPERT LESPEARE Individually and on behalf of all other persons similarly situated,

Appellees.

(Court of Appeals for Third Circuit No. 76-1926)

MOTION TO DISMISS OR AFFIRM

LEGAL SERVICES OF THE VIRGIN ISLANDS
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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, paragraphs 1(a), 1(c) and 1(d) and Rule 24 of the Rules of the Supreme Court of the United States, appellee Rafael Lockhart moves for the following relief:

(1) The appeal be dismissed since this Court does not have jurisdiction pursuant to 28 U.S.C. 1254(2) to review the constitutionality of Sec. 129(a), Title 24 of the Virgin Islands Code, a territorial statute at issue in this case;

(2) If the appeal is dismissed as improvidently granted and treated as a petition for certiorari pursuant to 28 U.S.C. Sec. 2103, then the petition should be denied on the ground that Sec. 129(a) of Title 24 of the Virgin Islands Code stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Immigration and Nationality Act, 66 Stat. 163 as amended, 8 U.S.C. Secs. 1101 et seq., and is, therefore, invalid under the Supremacy Clause of the United States Constitution as found by the Third Circuit Court of Appeals in its opinion below, Rogers v. Larson, 563 F. 2d 617 (3d Cir. 1977) and for the reasons discussed in Topic II of the argument attached hereto; or in the alternative,

(3) If an appeal shall be permitted pursuant to 28 U.S.C. Sec. 1254(2), then the sole issue raised by appellant, that Sec. 129(a) of Title 24 of the Virgin Islands Code does not violate the Supremacy Clause, is an unsubstantial question and does not need further argument for the reasons discussed in Topic II of the argument attached hereto.

DATED: February 19, 1978

Respectfully submitted,

LEGAL SERVICES OF THE VIRGIN ISLANDS

By Thomas A. Elliot
Thomas A. Elliot
Patricia Fron
J. Steven Xanthopoulos

ARGUMENT

I THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IS NOT PROPERLY REVIEWABLE BY APPEAL PURSUANT TO 28U.S.C. Sec. 1254(2) SINCE THE STATUTE AT ISSUE IS A TERRITORIAL STATUTE RATHER THAN A STATE STATUTE.

Appellant attempts an appeal from the decision of the Third Circuit Court of Appeals in this case by invoking Title 28, Section 1254, paragraph 2 of the United States Code (Jurisdictional Statement at 3). Section 1254(2) requires, inter alia, that the constitutionality of a State statute be at issue. In the instant case, the constitutionality of only a territorial statute is being argued and therefore this case is not reviewable by appeal under 28 U.S.C. Sec. 1254(2).

II THE SOLE QUESTION PRESENTED BY THE APPELLANT IN THIS APPEAL -- THAT THE COURT OF APPEALS ERRED IN DETERMINING THAT A TERRITORIAL LAW, 24 V.I.C. Sec. 129(a), REGULATING THE EMPLOYMENT OF NONIMMIGRANT WORKERS IS VIOLATIVE OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION -- IS UNSUBSTANTIAL AND NEEDS NO FURTHER ARGUMENT.

Congress granted to the Attorney General of the United States, and through him, to the Immigration and Naturalization Service, the exclusive authority over the admission, duration, and conditions of stay of all nonimmigrants. Sections 103(a), 214(a) Immigration and Nationality Act (INA). The States or Territories are granted no such powers either under the United States Constitution, see DeCanas v. Bica, 424 U.S. 351, 358 n. 6 (1976); Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 419 (1948), or by Congress, since this federal authority over admission or conditions of stay of a legal entrant is a regulation of immigration and unquestionably an exclusive federal power. DeCanas v. Bica, 424 U.S. at 354, 355.

The appellee, Rafael Lockhart, was admitted to the Virgin Islands as a nonimmigrant worker by the Immigration and Naturalization Service under Sec. 101(a)(15)(H)(ii) INA. (Jurisdictional Statement at 5.).

Section 101(a)(15)(H)(ii) INA provides:

> "(H) an alien having a residence in a foreign country which he has no intention of abandoning ... (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country. ..."

Appellant has not disputed that Lockhart was properly admitted under the requirements of Sec. 101(a)(15)(H)(ii), because "unemployed persons capable of performing such services cannot be found in this country."

However, the thrust of appellant's argument before this Court is that after admission and during federally-approved stay for work, an alien worker should be held to the same standards that existed at the time of his admission under Sec. 101(a)(15)(H)(ii), namely, that unemployed persons are not available. Appellant claims this is congressional intent. Thus, Sec. 129(a) which terminates H-2 workers at any time and replaces them with resident workers capable of performing such work, appellant argues, furthers this congressional intent. See Jurisdictional Statement at 9-12.

Appellant, interestingly, has cited no statute, or corresponding legislative history or regulation that supports his reasoning. On the contrary, the federal statutes, including Sec. 101(a)(15)(H)(ii) are silent as to any control which alien workers will be subject after they are admitted in this country and the Court of Appeals below so found. Rogers v. Larson, 563 F.2d 617, 622-623 (3d. Cir. 1977).

To fill this void, federal regulations authorize an approved job for a fixed period of stay, i.e., for a year or less. 8 CFR 214.2(h)(7). 563 F.2d at 622. Plainly, Sec. 129(a) conflicts with this federal regulation by operating to terminate appellee's employment before the expiration of his federally-authorized stay, working at a federally-certified job. See 563 F.2d at 626. In this situation, where compliance with both federal and local regulations is physically impossible, a holding of federal exclusion of local law is inescapable without even inquiring into congressional design. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-143 (1963).

Indeed, the Court of Appeals in its opinion below found a conflict between this federal statutory scheme (amplified by regulations in 8 CFR Ch. 1) insuring a continuity of the work force and the Virgin Islands scheme terminating alien workers at any time under Sec. 129(a). Plainly, Sec. 129(a)'s disruption of the federal scheme stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the INA, and is, therefore, invalid under the Supremacy Clause, Art. V. Cl. 2, of the United States Constituion.

This Court has already recently decided the issue to what extent local governments can regulate employment of aliens. DeCanas v. Bica, supra. Although holding that local authorities may regulate employment of illegal aliens, this Court specifically remanded the case back to the California courts to determine if Sec. 2805 of the California Labor Code is nevertheless unconstituional because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the INA. Hines v. Davidowitz, 312 U.S 52, 67 (1941); Florida Lime & Avocado Growers v. Paul, 373 U.S. at 41. 424 U.S. at 363.

The "obstacle" the Court found in DeCanas was that Sec. 2805 may impinge upon federal law permitting the alien to work. 424 U.S. at 364. This is precisely the situation in the instant case. Federal law permits Lockhart to work while local V.I. law, Sec. 129(a), denies him this opportunity to work. Furthermore, the DeCanas opinion noted that this "obstacle" existed even though the alien is not entitled to lawful residence, while in the instant case, the H-2 [1/] worker is already lawfully residing in the United States. 424 U.S. at 364. This Court has long ago decided that local laws

> which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constituitionally derived federal power to regulate immigration, and have accordingly been held invalid." Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) [emphasis by the Court]. DeCanas v. Bica, 424 U.S. at 358 n.6.

1/ An alien admitted under Sec. 101(a)(15)(H)(ii) INA.

CONCLUSION

This appeal should be dismissed since this Court does not have jurisdiction under 28 U.S.C. Sec. 1254(2) to review the constitutionality of 24 V.I. Sec. 129(a) which is a territorial statute.

If an appeal is permitted or treated as a petition for certiorari, the sole issue that appellant has sought to review is that the Supremacy Clause of the Constitution has not been violated claiming that Sec. 129(a) is harmonious with the federal scheme. The plain language of Sec. 129(a) conflicts with federal regulation (8 CFR 214.2(h)(7)), the intent of Congress in enacting the INA, and the cases of this Court (which reserve exclusive federal power to the federal government to regulate the employment of aliens lawfully within the United States). Thus, the question urged by appellant that no conflict exists between the federal and local schemes is so unsubstantial as not to need further argument.

Respectfully submitted,

LEGAL SERVICES OF THE VIRGIN ISLANDS

BY Thomas A. Elliot
Thomas A. Elliot

Thomas A. Elliot, Esq.
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J. Steven Xanthopoulos, Esq.
Of Counsel

AFFIDAVIT OF SERVICE

TERRITORY OF THE VIRGIN ISLANDS)
DIVISION OF ST. CROIX) ss.:

I, THOMAS A. ELLIOT, being duly sworn, depose and say that I caused a copy of the attached Motion to Dismiss or Affirm to be mailed with sufficient postage to the Department of Law, Attorney for appellant, c/o Thomas M. Utterback, Assistant Attorney General, Department of Law, P. O. Box 280, Charlotte Amalie, St. Thomas, U. S. Virgin Islands 00801.

February 19, 1978 Thomas A. Elliot
Thomas A. Elliot

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 19th DAY
OF FEBRUARY, 1978.

Brian L. Masony
Notary Public